

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1474

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha",
a/k/a "Sha", and ERNEST GEORGE TEPPER, a/k/a
"Born Freedom",

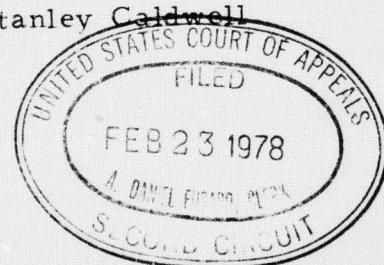
Defendants - Appellants.

2/23

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
NORMAN STANLEY CALDWELL

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(6986 B)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
Appellee, :

-v-

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha",
a/k/a "Sha". and ERNEST GEORGE TEPPER, a/k/a
"Born Freedom", :
Defendant-Appellants. :

-----x

On appeal from the United States District
Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT,
NORMAN STANLEY CALDWELL

ISSUES PRESENTED

1. Whether the trial court erred in declining to charge the jury that in order to find an attempt to rob a bank, "the substantial step or steps must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendant's original plan."
2. Whether under the Court's own charge, there was sufficient evidence to constitute an attempt to rob a bank.
3. Whether there was sufficient evidence to sustain a conviction for conspiracy to rob a bank.

PRELIMINARY STATEMENT

This case is before this Court on an appeal from a judgment of conviction rendered upon a jury's verdict of guilty of the crimes of conspiracy and attempted bank robbery. On November 14, 1977, appellant was sentenced under the Youth Corrections Act pursuant to 18 U.S. Code 5010B (Hon. Charles H. Tenney). Appellant is presently incarcerated pursuant to said judgment.

FACTS BELOW

Reginald Hassell, testified that he was employed as a bookkeeper for Frieman Coated Fabrics at 7 Mercer Street. On June 30th, 1977, he noticed a car parked on the corner which was similar to one owned by his boss; the car was white with a blue top. There were three people sitting inside the car talking to each other. The car was parked on the northeast corner of Howard and Mercer (30-32)*.

About a half hour later, Hassell noticed that the car was parked on the other side of Howard and Mercer, on the southeast side. He discussed the matter with others in the office and they telephoned the police, because the car looked like a car that was once used in a robbery. He gave the police a description of the car and told them how many people were in it. While he was on the phone, two of the men got out of the car (36-37). One of these two men wore a tan jacket and a blue hat with a red stripe, and the other wore a brown sweater and a black hat; the hat worn by the man with the brown sweater was marked

* Unless otherwise indicated references are to page numbers of the trial transcript.

as Government's exhibit 2, and the hat worn by the man with the tan jacket as Government's exhibit 3. They walked east on Howard Street and turned into the courtyard in front of the European American Bank (41-42). Later Hassell saw the two men walk back towards their car. The man with the brown sweater and black hat appeared to have something under his sweater, he was walking with a stiff arm. The other man had on loud colored gloves. The men got into the car and drove off. Later the car returned, and he called the police again; he might have told the police that the guys had guns (43-45).

Hassell walked up to the European American Bank, and told the bank guard that he had just called the police and that perhaps someone would attempt to rob the bank; the guard said that the bank was already under surveillance. As he walked back to his office, Hassell saw the car return, and the two men walk past him on the opposite side of the street; they walked in the direction of the bank. He didn't notice the men's faces (48-50).

A few minutes after he returned to the office a cab pulled up behind the car and several men got out and then a police officer came into the office and asked whether that was the car reported to the police. He answered affirmatively, the officer left, and then the man in the car got out and was put up against the wall. The man wore a light blue hat, which was marked as Government's exhibit 4 (51-53).

After a while, the police returned to the office and pointed to the corner, across the street from the bank. People were sitting on a long loading platform. Hassell saw the two men who he had seen before

and told the police, "Yeah, that's the guys." The two men got up, walked to Broadway, and made a right turn towards Canal Street (53-54).

On cross examination, the witness recalled that when he telephoned the police, he told them that the men were going towards the bank with guns. Actually, he didn't see any gun, but only assumed there was a gun (83).

Jennifer Cheong, testified that she was employed as a secretary at Freiman's Coated Fabrics, and that on June 30th, 1977, she observed through the window of her office, a white automobile with a blue vinyl top parked opposite her building on Mercer Street, south of Howard Street (90-93). She spoke with Reginald Hassell, and went outside and wrote down the license number of the car (94). She saw the two men who had been in the car walking towards Freiman's Building, one had on a light brown jacket and the other dark clothes; both wore hats, but she could not recall their colors. They were the same type hats as Government's exhibit 3. The man in dark clothes seemed to have something under his arm, and presumed it to be a gun; the other man walked with both hands in his pockets, and was wearing yellow-greenish gloves. The men entered the car, remained a few minutes and then drove off. Hassell had called the police, and told them that the car had gone. A few minutes later the car returned, and Ms. Cheong telephoned the police; she told them that she suspected a bank robbery was going to occur (100-103). She would not be able to identify either of the two men she had seen (105).

Francis Leavey, testified that he was the branch manager of the European American Bank, at 433 Broadway. On June 30th at about mid-day, one of the tellers refused to make change of a dollar for someone, and that person commented "What kind of a bank is this where you can't get change of a dollar for a bus." Leavey went over and made change for him, and the man left. This person was a black male, and wore dark clothing with a dark hat (163-166).

Shortly thereafter, another individual came in; Leavey went over to him and inquired if he could be of assistance. The man made no response, only mumbled and left the bank. This man wore light clothing; the witness could not recall whether he wore a hat (166-168).

Though he was not certain, Leavey testified that the first of the two men resembled appellant, Caldwell. The second man to enter the bank was near the customer service counter; that is where withdrawal and deposit slips and brochure material on loans were kept. Leavey had the exchange with the second man inside the entrance to the bank; to the right of the entrance there is a camera which is quite prominent. In answer to his inquiry of assistance, Leavey received only an inaudible reply, a mumble (183-188).

Delores Brown, testified that she was employed as marketing manager for the European American Bank. About mid-day on June 30th, she noticed a man come into the bank and receive change of a dollar from Frank Leavey, after the teller did not give him change; the man wore dark clothing and a black hat (220-222). About a minute or two later, another young man entered the bank, walked over to the table and got a deposit slip or a brochure, and left. A bank guard was standing next to the table, and

Mrs. Garrison, a sales representative, asked him if she could be of help; the man said "no". This second man wore a blue hat. The witness could not identify in Court either of the two men who had entered the bank (223-225).

Ms. Brown received a telephone call saying that the bank would be held up. She looked out the window and saw two men sitting on a loading platform across the street from the bank. She saw the man with the blue hat and another man also wearing a hat (226-227). She received another telephone call, and the caller said, "I think your bank is about to be held up". She notified the guard, and told him to lock the door (230-231). At about the same time as the door was locked, a Detective Carbone came to the bank, and said that it was alright to unlock the door, because the police were outside (232).

Debra Garrison, testified that she was head teller at the bank. When she returned from lunch on June 30th, she noticed a young black male enter the bank, go over to the customer convenience counter, and look at the bank guard. She approached him and inquired if she could be of help; she didn't remember if he responded. The man wore a light blue hat, which was pulled down over his face. The color of the hat seemed similar to Government's Exhibit 4 not 3. The man then took a savings deposit ticket, headed for the exit, and folded the ticket in half and put it in his right hand back pocket. At the door, he spoke with Frank Leavey, the bank manager (257-261). The witness could not identify anyone in Court as the man she had spoken to in the bank (262).

Harvey Shild, testified that on June 30th, he was a guard employed at the European American Bank. A young man came in and took a deposit slip from the service area. As he was leaving, the man had a conversation

with Mr. Leavey. Leavey asked if he could be of service, and the man answered, "no, no, all I wanted was a deposit slip" (281-287). The conversation between Leavey and the young man took place at the back of the bank, directly opposite the front door; it was the entire length of the bank away from the front door (296). The color of the man's hat was more like Government Exhibit 4, a powder blue hat, than Government's 3, a red and blue hat (298). The man wore his hat full on top of his head; he had a chance to look at him, but everything occurred so fast that he didn't get a good look at the man (300).

The witness did not see the young man wearing any gloves, he did not see any bulges in his pockets, and he did not have his arm in an unnatural position (307-308).

Ivan Keith Bonner, was called as a witness on behalf of the Government. He refused to testify, was granted immunity, still refused to testify, and was found to be in contempt of Court (317-324).

Police Officer Richard Hickman, testified that while patrolling in a taxi cab he received a radio communication to investigate a suspicious auto occupied by three males (325-327). He parked the cab about fifty yards behind the white car, with the blue vinyl roof, and another police car stopped in front of the white car; only the driver was in the car. Another police officer requested the driver to get out of the car. The man was wearing a blue hat, similar to Government's Exhibit 4. The witness identified co-defendant Tepper as the person in the car (329-331).

Hickman ascertained that the person who had made the 911 call was located at a textile store located at 7 Mercer Street. He then spoke to a man and woman there, and they told him that the car had been used in a prior bank robbery. The man in the store also told him that two

other men got out of the car and that one was putting on plastic gloves and the other was putting what he believed to be a shotgun up his sleeve. Hickman relayed this information to his fellow officers (332-334). The witness went up the street and observed two black males sitting on a loading platform on the southwest corner of Howard Street and Broadway. An officer from the Major Case Squad told Hickman and his fellow officers to stay out of the area, because the Major Case Squad had it staked out. While Hickman was talking with Sergeant Peters and a member of the Major Case Squad, Peters pointed to the corner of Mercer and Canal Streets and said, "There are the two". These were the same two men who had been sitting on the loading platform. In the meantime, co-defendant Tepper had been placed under arrest. Upon hearing the alarm, the three officers ran down Mercer Street towards Canal. They ran into a hardware store located at the corner. Inside, they observed the two black males from the loading platforms and another police officer. An officer from the Major Case Squad came out of an alcove located in the middle of the store with a gun in his hand. One of the officers removed a black hat from one of the two men, and he had a rolled up stocking on his head. Hickman identified appellant Caldwell as one of the men in the hardware store; he was wearing a blue hat with red stripes, Government's Exhibit 3 (336-345).

On cross examination, the witness stated that there was nothing suspicious about the two men sitting on the loading platform, what aroused the police were the calls to the police and the conversations with the people in the textile store (372-374).

Police Officer Francis La Spina, testified that on June 30th,

1977, while patrolling in a taxi cab, he received a radio report to investigate a white and blue automobile which had been used in prior bank robberies. La Spina was driving and Sergeant Peters was in the cab with him. They drove to Mercer Street and pulled up the cab in front of the car; there was only one occupant in the auto. After looking at the license and registration; the police asked the driver to turn the motor off and step out of the car. La Spina identified co-defendant Tepper as the occupant of the auto. Tepper was wearing a hat, Government's Exhibit 4 (378-385).

When Officer Hickman returned from 7 Mercer Street after verifying the radio run, handcuffs were placed on Tepper. La Spina searched under the front seat of the car and found a holster (385-386).

Det. William J. Carbone, testified that he was assigned to the Major Case Squad. On June 30th, after he received a radio message, he went to the European American Bank, located at the corner of Howard Street and Broadway. After having a conversation with a bank officer, he noticed two men, appellant Caldwell and Mr. Bonner, sitting on a loading platform opposite the bank; they were looking in the direction of the bank. Caldwell was wearing a blue hat, Government's Exhibit 3, and Bonner wore a hat, marked Government's Exhibit 2 (410-415).

Carbone went to a hallway of a building on the same side of the street where the men were sitting, and kept them under observation. He then crossed the street, and observed them from inside a stationery store. Carbone then saw the two men get up, and walk east on Howard Street to the corner of Canal Street. They then turned right and walked southbound towards Canal. Carbone left his observation post and ran up to Canal Street. He saw Det. Nichols and said to him, "Come on,

there they go". He followed them up to Canal and Broadway. As the two men were walking westbound on Canal Street, on the north side of the street, Carbone was on the south side of the street, keeping them under observation. The witness observed a large crowd on the corner of Canal and Mercer Streets, looking into the street. He saw Caldwell and Bonner also look up the block, and then immediately turn and dash into a hardware store located on the corner. Carbone then ran across the street and went into the store. As he ran across Canal Street, he took out his revolver and shield (416-420).

As Carbone opened the door, he saw the two men walking to the back of the store. The detective hollered, "Hey". Bonner stepped into an aisle located on the right side of the store. Caldwell stopped in his tracks. Carbone heard a very hard metal-like object hit the floor, and Bonner stepped out of the aisle. Sergeant Stiasny and Det. Nichols arrived, and Carbone went into the aisle where Bonner had been. There was a stairway, and Carbone could see a gun at the bottom of the stairs; he went down and retrieved it (421-423). Carbone noticed that Bonner was wearing a pair of yellow surgical gloves; another pair was recovered by the police in Tepper's automobile (425).

On cross-examination, Carbone testified that while he had the men under surveillance, he had formed the opinion that they were getting ready to rob the bank. He didn't arrest them at that time because he didn't think that he had sufficient grounds (433).

Sergeant Martin Stiasny, testified that he was a member of the Major Case Squad, and that he observed two men sitting on a loading platform opposite the European American Bank; he observed them from a doorway with Detectives Carbone and Nichols (477-479). The

witness followed Carbone into the hardware store, and he saw two black males in the rear of the store who were put under arrest (482).

Dale R. Lovin, testified that he was an F.B.I. agent (505). On June 30th, at about 4 o'clock in the afternoon, at his office, he interviewed co-appellant Ernest George Tepper. Tepper told him that he, Caldwell, and Bonner were killing some time driving around, and that he knew nothing of any bank robbery or attempted bank robbery. He told Lovin that the two people who were in his car wanted to get out; he let them out, and then while alone in the car he was arrested. Upon further questioning, Tepper stated, "I went to rob the bank by myself. I don't know what the other guys were doing, but I was going to rob it by myself." Lovin responded that he didn't believe him, and Tepper then said, "Okay, you got me, man. Make your case (508-513).

On redirect examination, Lovin stated that on the following day, July 1st, he knew that Tepper told the United States Attorney that he had gone downtown to buy some glass, and that he didn't know anything about a bank robbery. He also said that he did not know why he was arrested, and that he did know that there was either a gun in the car or that his friends had a gun, but he didn't think it was any big deal because everybody in New York carried a gun(567-568).

Joseph P. Conway, testified that he was a special agent with the F.B.I. On July 1st, 1977, in the office of Assistant United States Attorney, Jane Parver, he sat in on an interview with co-appellant Tepper. Tepper said that he had gone downtown to buy glass. In answer to the question, "Did you know they had a gun", he responded, "Yes, because everybody in New York has a gun" (655-658). On redirect examination, after examining his notes, the witness recalled Tepper saying

that he knew they had a gun, and he said everybody in New York had a gun (669).

Counsel for appellant Caldwell moved for a mistrial, on the ground that Conway's testimony concerning Tepper's statement was in violation of the Bruton rule. Counsel further stated that he was previously unaware of Tepper's statements which inculpated Caldwell, and had he been so, would have moved for a severance. The prosecutor replied that it was Tepper's statement that he knew there was a gun in the area, and he did not say that he knew Caldwell had the gun. The motion was denied (673-674).

James Patrick Carrig, testified that he was a special agent with the F.B.I., and that on June 30th, at about 3 p.m., he interviewed appellant Caldwell at F.B.I. headquarters. After being advised of his rights, appellant related what he had done during the day of June 30th. He had breakfast at a friend's house, and then between 10 and 10:30, he headed towards a playground area in Jamaica, Queens. On the way he ran into Tepper and Bonner, who were driving in Tepper's car. They then discussed going to the Islamic Temple in Harlem, and he drove with them into Manhattan via the Queens Midtown Tunnel. Then they went to the lower Manhattan area where they drove around for a while. In the area of Canal Street and Broadway, Bonner indicated that he wanted to get out of the car and check something out. He and Bonner got out, and appellant noticed the European American Bank; he decided to inquire at the bank about his chances of receiving an educational or student loan. He entered the bank and discussed the loan possibility with a bank representative. He left shortly thereafter and rejoined Bonner across

the street. They then decided to rejoin Tepper. As they were heading towards the car, along Canal Street, they turned off of Canal Street up Mercer Street, and they observed Tepper talking to police officers. He and Bonner turned and went into a hardware store on Canal Street, where they were arrested. Caldwell acknowledged that he wore a stocking on his head, and that he always wears a stocking to keep his hair in place and to keep it neat (644-650).

Caldwell also stated that he had no intention of robbing any bank. The agent did not write down the exact words used by Caldwell; he wrote down the substance of the remarks (653-654).

At the conclusion of the Government's case, counsel moved for a verdict of acquittal, and particularly argued the legal insufficiency of the attempted bank robbery count; the motion was denied (674-676).

Appellant Caldwell presented no witness on his own behalf. Co-appellant Tepper called witnesses who testified about his financial situation as of June 30, 1977 (678-694).

Prior to the Court's charge, appellants submitted a specific request on attempted bank robbery; the Court declined to do charge (A9).). At the conclusion of the Court's charge, appellants again excepted to the instructions regarding the crime of attempted bank robbery (A42).). Both defendants were found guilty of conspiracy and attempted robbery (828-829).

A written motion was made by appellant Caldwell to set aside the jury's verdict; the motion was denied (A43-49).

ARGUMENT

Point One

THE TRIAL COURT ERRED IN NOT CHARGING THE JURY IN ACCORDANCE WITH APPELLANTS' REQUEST.

The trial court charged the jury on the attempted bank robbery count in accordance with this Court's rulings in United States v. Stallworth, 543 F. 2d 1038 (1976) and United States v. Jackson, 560 F. 2d 112 (1977) cert den. (Nov. 7, 1977). The charge as given, was unduly restrictive.

The gravamen of Stallworth and Jackson is that once the criminal intent to rob a bank has been established, further substantial steps in furtherance of the plan which strongly corroborates the criminal intent to rob the bank constitutes an attempt to rob the bank. Citing United States v. Mandujano, 499 F. 2d 370, 378 (5th Cir. 1974) cert den. 419 U.S. 1114 (1975), appellants requested the Court to include in its charge: "The substantial step or steps must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendant's original plan." The Court declined to so charge. Upon examination, it will be clear that the requested charge amplifies and elucidates the Stallworth and Jackson holdings, and is in harmony with the rulings of other federal circuit courts.

This Court, both in Stallworth and Jackson refer with approval to the two-tiered formula cited in United States v. Mandujano, supra, namely, 1) that the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting, and 2) the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step

must be conduct strongly corroborative of the firmness of the defendant's criminal intent. This Court has not explicitly stated its adoption of that portion of the Mandujano decision embodied in appellants' request to charge. However, the actual holdings in Stallworth and Jackson, based on the facts in those cases, do support the added element that the substantial step must be an immediate step in the execution of the criminal design, the progress of which would be completed unless interrupted by some external factors not part of defendants' original plan.

As the Court which propounded the Mandujano two-tiered formula, the Fifth Circuit recently had occasion to further explain its formula and distinguish it in United States v. Oviedo, 525 F. 2d 881 (1976). Oviedo was charged with attempted distribution of heroin. The evidence seized from his premises was in fact an uncontrolled substance. The Court explained, *supra* at 885:

"Thus, we demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law."

As Oviedo stated that he would sell heroin, and in fact the substance was an uncontrolled substance, the Court concluded, *supra* at 886: "Based on these objective facts we cannot infer that he intended to do that which he said he was going to do, because in fact he did something else."

Mandujano, on the other hand, had negotiated a sale of heroin and had received money with which to purchase it. He stated that he was going to his source to buy the heroin. Even though he was unable to purchase the heroin, the Court upheld his conviction for attempted distribution of heroin. The Court held that Mandujano's objective conduct strongly corrobo-

rated the firmness of his criminal intent. "Importantly, there were no objective facts which made these acts equivocal." United States v. Oviedo, supra at 886. Mandujano had set out to sell heroin, and unequivocally took substantial steps towards that purpose. His plan would have been completed, but for the fact that his source could not supply him with the heroin.

In United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974), a conviction for attempted bank robbery was upheld, where the defendants in furtherance of their plan to rob a bank, seized the bank manager at gun point at his home. Even though they abandoned their efforts after the manager explained the operation of the bank's timelock, the Court held that the defendants' actions had proceeded beyond preparation and constituted an attempt; but for the timelock, they would have continued their original plan. Seizing the bank manager unequivocally corroborated their intent to rob the bank.

In Rumfelt v United States, 445 F.2d 134 (7th Cir. 1971), the Court held that there was sufficient evidence to uphold an attempted bank robbery conviction where the defendant was standing in front of the bank, wearing a mask, and was using a carbine to intimidate a hostage for the purpose of getting into the bank (cf. appellant in the case at bar was arrested several streets from the bank after he walked away from it).

In Stallworth, supra, this Court was quite correct in finding that the defendants had unequivocally set out to rob a bank. In addition to providing an informant within the gang with recording and monitoring equipment, the Government received detailed evidence of the gang's preparation for the robbery. The defendants' actions went so far as to prepare to enter the

bank in order to actually rob it, when the police moved in.

In the Jackson case, supra, the Government again had the benefit of an informant's testimony detailing the preparation and conduct of the robbery gang. On one occasion the defendants did not go through with the robbery because they arrived at the bank too late, and on a second occasion they abandoned their plans, because they detected the police surveillance agents. Referring to the trial court, this Court observed, supra at 120:

"He concluded that on both occasions these men were seriously dedicated to the commission of a crime, had passed beyond the stage of preparation, and would have assaulted the bank had they not been dissuaded by certain external factors, viz., the breaking up of the weekend deposits and crowd of patrons in the bank on the afternoon of June 14 and the detection of the F.B.I. surveillance on June 21."

The crux of the rule of law enunciated in Jackson and the other cases is to be found at footnote 8, supra at 121: (that the defendants) "gave every indication that they were ready to strike." And that readiness to strike is transformed into an attempted when it is frustrated or interrupted by some external factor not part of the original criminal plan.

The trial court's charging of the bare bones of the Stallworth and Jackson rule, without the requested amplifying charge was incomplete and confusing to the jury. The request to charge of appellants should have been given to the jury.

Point Two

THE TRIAL COURT ERRED IN SUBMITTING THE ATTEMPTED ROBBERY COUNT TO THE JURY AND IN DENYING APPELLANT'S MOTION TO SET ASIDE THAT VERDICT.

Even applying the Stallworth and Jackson rule, without the necessary amplification, the facts in the instant case cannot support a verdict of guilt.

The crucial point to bear in mind is that appellant was arrested after he walked away from the bank, and several streets from it. The testimony of Detective Carbone is most illustrative. He did not arrest appellant while he was sitting on the loading platform opposite the bank, because he felt that he had insufficient evidence. Yet he did make the arrest, an arrest for attempted bank robbery, after appellant walked away from the bank and entered a hardware store several streets away from the bank. How can walking away from a bank be supportive of evidence indicating a readiness to strike! Unlike the defendants in Jackson, there is no evidence in the record demonstrating appellant's awareness of police surveillance.

In Stallworth and Jackson, the evidence of the defendants' intent to rob the bank was supplied by direct testimony. Their further acts of acquiring weapons, and other paraphernalia to effectuate the robbery were found to be strongly corroborative of the underlying intent to rob; the further steps were unequivocal in connection with the purpose at hand.

Here, there is no direct testimony about any intent to rob a bank. The jury was permitted to infer a criminal intent from the very same acts which are supposed to be corroborative of that criminal intent. And the acts, which are defined by the Government as substantial steps towards the commission of the crime of robbery, are in themselves equivocal in nature.

The conduct which prompted the arrest was appellant and Bonner entering a hardware store, after first having looked into Mercer Street and seeing Tepper in the custody of the police. It is pure conjecture to relate this episode to intending to rob a bank several streets away. The fact that Bonner had a gun on his person when he entered the hardware store is likewise equivocal. Unfortunately, as Tepper indicated to the police, it is not uncommon for people to carry guns. Such evidence is not unique to robbing a bank. Likewise is the wearing of a stocking on the head and wearing a plastic glove. Appellant told the F.B.I. agent that he always wore a stocking to keep his hair in place and to keep it neat. And only Bonner was wearing a plastic glove in the hardware store; the other pair was found in Tepper's automobile.

Taking all of the Government's evidence together, it is patently clear, that whatever may have been appellant's intentions in the matter, his conduct did not reach the stage of a readiness to strike, i.e. an attempt to rob the bank.

Point Three

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR CONSPIRACY.

There is no direct evidence in the record as to the formulation of any agreement to rob the European American Bank. The Government, however, relies on a series of inferences to prove such an agreement. Nevertheless, as this Court has stated in United States v. Borelli, 336 F. 2d 376, 384 (1964):

"Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant."

As discussed in Point Two, above, the conduct of appellant and his co-defendants were ambiguous, not only as to the question of attempt, but likewise as to the very question of their actual intentions. In addition to the evidence involving the gun, stockings and gloves, it is still not certain as to what they were thinking, even considering their loitering around the area of the bank and their entry into the bank. Appellant stated to the F.B.I. that he spoke with the bank manager about a student loan. Even though the jury rejected appellant's contention by its verdict, such evidence is too speculative to warrant an inference of an agreement to actually rob the bank. The three defendants arrested are young men. It is clear from appellant's and Tepper's statements to the F.B.I., that they spontaneously got together to take a ride into Manhattan. It is suggested that real bank robberies are not agreed upon and planned so casually.

CONCLUSION

The judgment below should be vacated and the indictment as to appellant dismissed.

Respectfully submitted,

GERALD ZUCKERMAN
Attorney for Defendant-Appellant,
Norman Stanley Caldwell

February 22, 1978

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